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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

v.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE CITY OF BOSTON AS AMICUS CURIAE

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Questions Presented	10
Summary of the Argument	11
Argument	12
I. Order No. 398 was contrary to the express provisions of federal statutes	12
A. Several federal statutes require trustees or other officers operating a property to pay current local taxes	12
B. The New Haven Trustees are the officers operating the properties to which these current local taxes are assessed	20
C. These taxes are current expenses and not claims in bankruptcy proceedings	25
D. Order No. 398 results in the non-payment of these taxes	26
II. Order No. 398 was contrary to the express provisions of Massachusetts statutes and was an interference with Massachusetts laws	26
III. There was no legal basis for this overriding of federal and state laws by the District Court	29
A. The Bankruptcy Act does not confer any such power	29
B. This was not a legal declaratory judgment	32
C. This interference by the federal court was contrary to established policy where state agencies are concerned	33

PAGE

D. The possible effect on the New Haven estate is not a relevant consideration in determining the validity of Order No. 398 35

IV. The unjustifiable hardship imposed on the City of Boston by Order No. 398 makes that order an abuse of discretion 43

CONCLUSION 46

APPENDIX 48

AUTHORITIES CITED

CASES: PAGE

Baker v. *Atchison, T. & S. F. Ry. Co.*, 106 F. 2d 525 (C. C. A. 10th, 1939), cert. den. 308 U. S. 620 20

Board of Directors of St. Francis Levee Dist. v. *Kurn*, 98 F. 2d 394 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648 15, 19

Boteler v. *Ingels*, 308 U. S. 57 15, 25, 29, 36

Central Vermont Ry. Co. v. *Marsch*, 59 F. 2d 59 (C. C. A. 1st, 1932) 17, 25, 36

Dulberg v. *Zankel*, 67 F. 2d 534 (C. C. A. 2d, 1933) 42

First National Bank of Greeley v. *Board of County Commissioners*, 264 U. S. 450 34

Foust v. *Munson S. S. Lines*, 299 U. S. 77 46

Gillis v. *California*, 293 U. S. 62 17, 32, 37

Hennepin County, Minn. v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453 (C. C. A. 8th, 1936) 17, 18, 25, 45

Ingels v. *Boteler*, 100 F. 2d 915 (C. C. A. 9th, 1938) 36

In re Reorganization of Pittsburgh Rys. Co., 111 F. 2d 932 (C. C. A. 2d, 1940) 41

MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574 (C. C. A. 2d, 1930) 17, 25, 29, 36, 39

PAGE

Michigan v. *Michigan Trust Company*, 286 U. S. 334 ..... 16, 45
Missouri Pacific Railway Company v. *Kansas*, 216 U. S. 262 40
Murray's, Lessee et al. v. *Hoboken Land & Improvement Co.*, 18 How. 272 43
Palmer v. *Massachusetts*, 308 U. S. 79 ..... 29, 32, 34
Pennsylvania v. *Williams*, 294 U. S. 176 ..... 20, 33
Phillips v. *Commissioner of Internal Revenue*, 283 U. S. 589 43
Swarts v. *Hammer*, 194 U. S. 441 ..... 25, 29, 44
Thompson v. *Louisiana*, 98 F. 2d 108 (C. C. A. 8th, 1938) 15, 16, 32
Thompson v. *Magnolia Petroleum Company*, 309 U. S. 478 33
Warren v. *Palmer*, 310 U. S. 132 42
Webster and Atlas National Bank of Boston v. *Palmer*, 111 F. 2d 215 (C. C. A. 2d, 1940) 1

CONSTITUTION OF THE UNITED STATES:
Article I, § 8 29
Article X of the Amendments 29

STATUTES:
Federal Statutes:
Act of June 18, 1934, 48 Stat. 993 ..... 10, 13, 37
Bankruptcy Act:
§ 64a 29
§ 77 ..... 2, 3, 6, 9, 29, 30
§ 77 (c) (6) 6, 18; 19, 21, 40, 41, 48
Declaratory Judgment Act 15, 32
Judicial Code:
§ 24 (1) 14
§ 65 ..... 10, 13
§ 66 ..... 14, 19
§ 240 (a) 2
§ 274d 15

United States Code: PAGE
Tit. 11:
§ 104a 29
§ 205 ..... 2, 3, 29
§ 205 (c) (6) 6, 18, 21, 40, 41
§ 501 41
Tit. 28:
§ 41 (1) 10, 14, 19
§ 124 ..... 10, 13, 17, 18, 19, 37, 42, 45
§ 124a 10, 13, 15, 16, 17, 18, 19, 37, 41, 42, 45
§ 125 ..... 14, 19
§ 347 (a) 2
§ 400 ..... 15, 32
Massachusetts Statutes:
Acts of 1921, Chapter 363 65
General Laws (*Tercentenary Edition*):
Chapter 58A 10, 27
Chapter 59 ..... 10, 27
§ 57 8
§§ 59–65A 27
Chapter 60 ..... 10, 27
§§ 16–22; 24–28; 29–31A; 35–36; 37–60 27
§§ 19, 24, 27, 29, 35, 37–55 43
§ 37 36
Special Acts of 1896:
Chapter 516 ..... 7, 23, 27, 48
§ 2 24
§ 9 7
§ 10 ..... 7, 9, 10
§ 25 ..... 8, 10, 23, 27

MISCELLANEOUS:
Warren, *Federal and State Court Interference*, 43 H. L. R. 345 33

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BRIEF FOR THE CITY OF BOSTON AS AMICUS CURIAE

OPINIONS BELOW

The District Court for the District of Connecticut, on October 30, 1939, filed a "Memorandum of Decision on Petition for Order No. 398" which is not reported but is printed in the Record at pages 12–19. The opinion of the Circuit Court of Appeals, dated April 16, 1940, is reported at 111 F. 2d 215, sub. nom. *Webster and Atlas National Bank of Boston* v. *Palmer* and is printed in the Record at pages 185–196.

JURISDICTION

The order of the District Court, entitled "Order No. 398", was dated October 30, 1939 (R. 20). The decree of the Circuit Court of Appeals, reversing the District Court's order, was contained in an Order for Mandate filed May 16, 1940 (R. 197–198). A petition for a writ of certiorari was filed in this Court on June 1, 1940, and was granted on October 14, 1940 (R. 200). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code (28 U. S. C. § 347 (a)).

STATEMENT OF THE CASE

The order of the District Court which the Circuit Court of Appeals reversed was called "Order No. 398" (R. 20) and was rendered in proceedings under Section 77 of the Bankruptcy Act (11 U. S. C. § 205) for the reorganization of The New York, New Haven and Hartford Railroad Company (hereafter called the "New Haven"). The order, which was made upon a petition (R. 4) of these petitioners (hereafter called the "New Haven Trustees"), directed them as such Trustees to withhold payment of 1939 real estate taxes of the City of Boston, currently assessed and payable, upon the property of the Old Colony Railroad Company, the Boston and Providence Railroad Corporation and The Boston Terminal Company, and also to withhold payment of certain franchise taxes assessed against, and bond interest of, The Boston Terminal Company (R. 6). The trustee of the first mortgage bonds of The Boston Terminal Company appealed from this order (R. 80), and this appeal was thereafter carried on by the successor trustee, Webster and Atlas National Bank of Boston, the present respondent. Although counsel for the City of Boston was

present at the hearing held before the issuance of Order No. 398 (R. 24), this was not pursuant to the notice ordered to be given to parties (R. 11), which was not served on the City of Boston, and the City of Boston had not intervened and was not otherwise a party to the reorganization proceedings. Because of the interest of the City of Boston in Order No. 398 so far as it affected the payment of real estate taxes of the City, counsel for the City filed a brief as *amici curiæ*, by leave, in the Circuit Court of Appeals (R. 186). The position of the City is still the same, and it appears here as *amicus curiæ* for the same reason.

On October 23, 1935, The New York, New Haven and Hartford Railroad Company filed in the United States District Court for the District of Connecticut a petition (R. 44), which was approved the same day (R. 44–53), for reorganization under § 77 of the Bankruptcy Act (11 U. S. C. § 205), and those proceedings are still pending in that Court. On November 8, 1935, that Court appointed as Trustees of the Debtor's property Howard S. Palmer (president of the Debtor), W. M. Daniels, and James Lee Loomis (R. 53–56). On February 24, 1937, W. M. Daniels was relieved of his trusteeship (R. 94) and on March 10, 1937, Henry B. Sawyer was appointed in his place as a Trustee (R. 94). These men have continued as Trustees of the property of the principal Debtor since that time.

On June 2, 1936, the Old Colony Railroad filed in the same court a petition (R. 67) under Section 77 for reorganization in the same proceedings as those for reorganization of the New Haven. This petition had annexed to it a copy of a lease by the Old Colony to the New Haven for a term of ninety-nine years from March 1, 1893 (R. 72). The petition alleged that the lines of railroad owned or leased by the Old Colony formed an important part of the system of

the New Haven (R. 67); that since their qualification the New Haven Trustees had continued to conduct carrier operations over these lines (R. 68); that on June 1, 1936, the New Haven Trustees gave formal notice of their disaffirmance of the lease (R. 68); and that the problems of operation and administration of the property of the New Haven and the Old Colony were so interrelated that the interests of the Old Colony and its security holders would be best conserved by the continuance of unified operation by the New Haven Trustees (R. 70). On the next day, June 3, 1936, the court, by Order No. 74 (R. 81), approved this petition and ordered that until further order the New Haven Trustees continue to possess and to operate the property of the Old Colony, such operation to be for the account of the Old Colony.

On June 18, 1936, the court, by Order No. 75 (R. 85), appointed the same men who were the Trustees of the property of the New Haven to be Trustees of the property of the Old Colony, it being specifically recited in that order as the court's opinion "that the appointment of trustees herein should not disturb the continuity of operations of the railroad system of The New York, New Haven and Hartford Railroad Company as at present carried on by the trustees of that corporation and that the appointment of the Trustees of The New York New Haven and Hartford Railroad Company would best serve the interests of all parties in interest" (R. 85). In addition, that order recited that inasmuch as the public interest and the interests of the Old Colony and the New Haven required that until further order the railroad lines and property of the Old Colony be operated as an integral part of the system of railroads then being administered by the New Haven Trustees, it was ordered that "said trustees of The New

York, New Haven and Hartford Railroad Company, as such, be and they hereby are directed to continue to possess and operate the properties of Old Colony Railroad Company, such operation to be for the account of Old Colony Railroad Company or the Trustees of its property" (R. 87). The order gave the New Haven Trustees the power, among other things, "to operate, maintain and repair the railroad and properties" of the Old Colony (R. 87); to collect "the accounts, revenues, income, rents, profits, and tolls accrued from its railroads and properties" (R. 87); and from time to time until further order of the court to pay "all taxes and assessments due or to become due upon the properties, income, franchises, or business" of the Old Colony (R. 88), and "all necessary current expenses of every description in operating the railroads and property, preserving the assets and conducting the business" of the Old Colony (R. 88). The New Haven Trustees were further authorized, "in connection with their operation of the said railroad lines and property of the Old Colony Railroad Company as a part of the system of lines and properties heretofore operated by them," to mingle the funds, income, assets and equipment of the properties, and, except as otherwise expressly ordered by the court and pending its further order, for the purposes of operation only, "to deal with all the property subject to their control as a single railroad system" (R. 89). By paragraph 7 that order expressly directed the New Haven Trustees to pay the quarterly installment of Federal income taxes of the Old Colony due June 15, 1936 (R. 90).

By a lease dated April 7, 1888 (R. 129–143), the Boston and Providence Railroad Corporation had leased all its property to the Old Colony Railroad Company for a term of ninety-nine years. By Order No. 217, dated July 19, 1938 (R. 110), the same court ordered the trustees of the property

of Old Colony Railroad Company (hereafter called the Old Colony Trustees) to disaffirm and reject this lease forthwith; and those trustees did so (R. 113). The court also ordered the operation of the property of the Boston and Providence for the account of that corporation to be continued pursuant to Section 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)), and "since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate" (R. 112).

On August 4, 1938, shortly after the disaffirmance of the Boston and Providence lease to the Old Colony pursuant to Order No. 217 of the District Court for the District of Connecticut, a petition was filed in the United States District Court for the District of Massachusetts (R. 124) for the reorganization under Section 77 of the Boston and Providence. This petition recited, among other things, that the Boston and Providence lease to the Old Colony had been rejected and that the United States District Court for the District of Connecticut had ordered the operation of the property of the Boston and Providence to be continued by the New Haven Trustees for the account of the Boston and Providence (R. 125). On the next day this petition was approved (R. 126), and those reorganization proceedings are still pending in the District Court for the District of Massachusetts. Although separate trustees were later appointed by the Massachusetts District Court for the Boston and Providence properties, the operation of the Boston and Providence properties by the New Haven Trus-

tees pursuant to Order No. 217 of the Connecticut District Court (R. 112) has continued. The continuance of this operation is shown by the report of the New Haven Trustees (R. 144, at 147), the petition for Order No. 398 (R. 4, at 5), and also by statements in a brief of the New Haven Trustees (R. 177, 178).

In addition to the real property in the City of Boston owned by the Old Colony and the Boston and Providence upon which the City of Boston assesses taxes (R. 6), these railroads, together with the New Haven and the Boston and Albany Railroad Company, have had imposed upon them by a Massachusetts statute certain obligations in regard to real estate taxes of Boston, franchise taxes, bond interest, and operating expenses, of The Boston Terminal Company, which owns and operates the South Terminal Station in Boston. Chapter 516 of the Special Acts of Massachusetts of 1896 (quoted in part, R. 7–9, 154; quoted in full, *infra*, 48) establishes a corporation by the name of "The Boston Terminal Company" for the purpose of providing and operating terminal facilities in Boston "for the several railroad companies hereinafter authorized to hold the stock of said Terminal Company", and the companies which are named include the Boston and Albany, the Boston and Providence, the Old Colony, and the New Haven. Section 9 of that act (R. 8, *infra*, 53) provides that "All said railroad companies upon the completion of said station shall use the same, * * *". Section 10 (R. 8, *infra*, 53) provides that the companies required to use the union station shall pay to the Terminal Company for such use the amounts necessary to pay the expenses of its corporate administration, the maintenance and operation of the station and its facilities, all taxes and assessments which may be required to be paid by the Terminal Company, the interest upon its bonds, and a

dividend upon its stock, in proportion to the use which each one makes of the station and its facilities. Section 10 further provides that the proportion of the use shall be fixed by written agreement, or, if the companies are unable to agree, by the department which is now the Massachusetts Department of Public Utilities. Section 25 (R. 154, *infra*, 53) first refers to a franchise tax to Massachusetts upon the value of the capital stock of the Terminal Company, and then provides that "its real estate required by this act to be used by said railroad companies shall be assessed to and the tax thereon shall be paid by said railroad companies, * * *".

As of January 1, 1939, the City of Boston assessed real estate taxes upon the property of The Boston Terminal Company in the amount of $638,400 to the Boston and Albany Railroad Company, Boston and Providence Railroad Corporation, Old Colony Railroad Company, and The New York, New Haven and Hartford Railroad Company (R. 179), pursuant to the requirements of Section 25 of the Massachusetts Act of 1896. (No issue was raised in the courts below as to the form of the assessment. Re-assessment correcting inaccuracies was made on December 20, 1939, but that fact does not, of course, appear in this Record.) Taxes of the City of Boston and other cities and towns in Massachusetts and Rhode Island were also assessed on the other property of the Old Colony and Boston and Providence (R. 6). By the provisions of the General Laws of Massachusetts (Tercentenary Edition), c. 59, § 57, interest from October first commences to run on all taxes remaining unpaid after November first. On October 17, 1939, the New Haven Trustees filed the petition (R. 4) which is the basis of Order No. 398. In that petition they set out the imminence of payments for the taxes just described and also

for bond interest and Massachusetts franchise taxes, due November 1, 1939, of The Boston Terminal Company (R. 6). As to the taxes and bond interest of The Boston Terminal Company, the petitioners stated that a "proportion" would be payable "for the account of Old Colony and Boston and Providence estates" (R. 6). This "proportion" was stated to be 70 per cent (R. 6), and the method of calculating it was described in the petition as being the necessary result of the proportion of use determined under Section 10 of the Massachusetts Act of 1896 (R. 7–10). The City of Boston did not fix or agree to and does not now agree to this "proportion" of 70 per cent, but assessed the entire tax upon the Terminal Company property without apportionment; but as the remaining 30 per cent of the tax was paid by the Boston and Albany no issue on that point was raised in the courts below and does not appear to be present in this Court. In Paragraphs 7 and 8 of that petition (R. 10) the petitioners said in part that they were of the opinion "that they should make no further advances to or for the Old Colony and Boston and Providence estates which are not essential in operating the lines of railroad of Old Colony and Boston and Providence as directed by the Court pursuant to the provisions of Section 77 of the Bankruptcy Act"; that payment by the petitioners of these items of bond interest and taxes was "not essential, in the opinion of petitioners, to their operation of the lines of railroad in the estates of Old Colony and Boston and Providence" (R. 10); and that nonpayment of those items "would leave with the present creditors, viz., the taxing authorities and The Boston Terminal Company, their claims against the Old Colony and Boston and Providence estates instead of transferring those claims to petitioners" (R. 10); and they asked that the Court direct them as to whether or not

they should make advances for the payment of those items (R. 11). On October 30, 1939, the judge of the District Court, by Order No. 398 (R. 20), granted the petition and ordered the New Haven Trustees to "withhold the payments listed in Paragraphs 4 and 5 of said petition." This order was accompanied by a memorandum (R. 12–19) in which he gave his reasons.

QUESTIONS PRESENTED

The two main questions raised by Order No. 398 seem to be the following:

(1) Did the District Court have power to make any order of this kind?

(2) Was the order made by the District Court so clearly wrong that it should be reversed?

Matters included in the arguments of counsel on the foregoing issues, although they must be considered by the Court, do not seem to be properly described as "questions." Among these matters will be the various federal and state statutes such as Section 65 of the Judicial Code (28 U. S. C. § 124); the Act of June 19, 1934, 48 Stat. 993 (28 U. S. C. § 124a); Section 24 (1) of the Judicial Code (28 U. S. C. § 41 (1)); the various statutes of Massachusetts pertaining to the assessment and collection of local taxes (G. L. Chapters 58A, 59, 60); and the specific provisions of the Massachusetts Special Act of 1896, Chapter 516, §§ 10 and 25; all of which the City of Boston cites as authorities in support of its contention that Order No. 398 was properly reversed, but does not regard as questions presented for decision by the Court. On the other hand, the petitioners' prediction as to the practical effect on the New Haven estate if the New Haven Trustees should use the funds of that estate to pay the taxes and bond interest does not seem to be a

"question," but merely an argument, which the City of Boston contends is not relevant to this issue.

The City of Boston, as *amicus curiæ*, contends that the answers to the two main questions stated above should be:

(1) The District Court did not have power to make Order No. 398; and

(2) Order No. 398 was so clearly wrong that it requires reversal.

SUMMARY OF THE ARGUMENT

As to the power of the District Court to make such an order as Order No. 398, it is the contention of the City of Boston that on this application the District Court did not have power to relieve the petitioners from the necessity of paying taxes and bond interest required by the provisions of local laws. It is not necessary to determine now whether, upon application by the Commonwealth of Massachusetts, the City of Boston or other cities, or the bondholders of The Boston Terminal Company, to compel the New Haven Trustees to make the described payments, the Connecticut District Court would have had power to determine the validity, amounts, and proportions, of those payments, or to deny such an application, because Order No. 398 was not given pursuant to any such application. It was, instead, an application by trustees, appointed by the District Court to conduct a business, to be instructed that they need not comply with certain requirements of state and local laws in regard to that business, before any attempt was made by the authorities of that state to enforce those laws. It is the contention of the City of Boston that Order No. 398 was an improper attempt to make a declaratory adjudication of the rights of the City of Boston against these Trustees and that it is neither binding on the City of Boston nor a

protection to the New Haven Trustees from the consequences of their failure to make the required payments; but that as its practical effect is to make the enforcement of these rights impossible, it ought to be reversed.

Apart from the power of the District Court to make an order of this kind upon such an application, the City of Boston contends that the order which the District Court did make was clearly wrong in substance. The City of Boston contends that the order was directly contrary to the clear mandate of Congress as established in federal statutes, and also that it was an attempt by a federal court to interfere with the application of local laws, contrary to established policy, and for declared reasons which were not valid. In support of its contention the City, as *amicus curiæ*, advances the following propositions, set forth here as the main headings of its argument:

I. Order No. 398 was contrary to the express provisions of federal statutes.

II. Order No. 398 was contrary to the express provisions of Massachusetts statutes and was an interference with Massachusetts laws.

III. There was no legal basis for this overriding of federal and state laws by the District Court.

IV. The unjustifiable hardship imposed on the City of Boston by Order No. 398 makes that order an abuse of discretion.

ARGUMENT

I

Order No. 398 was contrary to the express provisions of federal statutes.

A. Several federal statutes require trustees or other officers operating a property to pay current local taxes.

Section 65 of the Judicial Code (28 U. S. C. § 124) imposes a criminal penalty upon a receiver or manager who fails to operate the property according to the requirements of the valid laws of the state in which the property is situated, in the following words:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both.".

The Act of June 18, 1934, 48 Stat. 993 (28 U. S. C. § 124a, apparently intended to follow Section 65 of the Judicial Code) states clearly the duty of any receiver, trustee, or other officer appointed by a United States court, to pay all state and local taxes, in the following words:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such

taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same.".

Section 66 of the Judicial Code (28 U. S. C. § 125), though not containing the explicit commands of the two statutes just mentioned, is further evidence that Congress has recognized the necessity of a compliance with local laws by receivers or other persons managing property under appointment by a United States court. That section is as follows:

"*Every receiver or manager of any property* appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.".

Section 24 (1) of the Judicial Code (28 U. S. C. § 41 (1))[1] also shows that Congress has recognized the necessity of paying local taxes and preventing interference by United States courts with local agencies whenever possible. In this section as amended in 1937 (the 1940 amendment not being relevant here) the pertinent words are the following:

" * * * * * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.".

[1] As last amended Aug. 21, 1937, c. 726, § 1, 50 Stat. 738, and Apr. 20, 1940, c. 117, 54 Stat. 143.

All the statutes quoted above show a consistent congressional policy. Whatever may formerly have been the chances for nice distinctions based on this multiplicity of pronouncements, the Act of 1934 (28 U. S. C. § 124a), quoted above, removes all doubts as to the duty of trustees operating a business property to pay current local taxes, and leaves no room for a United States court to make any order other than that the taxes be paid.

Boteler v. *Ingels*, 308 U. S. 57 (affirming 100 F. 2d 915).

Thompson v. *Louisiana*, 98 F. 2d 108, 111 (C. C. A. 8th, 1938).

See also *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394, 397 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648.

In *Boteler* v. *Ingels*, Mr. Justice Black said (at page 52):

> "We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated by a bankruptcy trustee makes the business immune from State laws and valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if such business [es] were conducted by an individual or corporation.'".

In *Thompson* v. *Louisiana* the proceedings were commenced by the state under the Declaratory Judgment Act (Judicial Code, § 274d; 28 U. S. C. § 400)[1] to have it adjudged

[1] As added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.

that the trustee of the property of a railroad in reorganization was liable for a state franchise tax. The court held that the taxes were a proper expense of administration and said that the effect of 28 U. S. C. § 124a was to require that all doubts be resolved in favor of the state taxes. The court then quoted from the opinion of Mr. Justice Cardozo in *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334 (at page 344), as follows:

> "Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security.".

After this quotation, the court, in *Thompson* v. *Louisiana*, said (at page 111):

> "There was more or less doubt and uncertainty as to whether, or under what conditions, receivers, liquidators, referees, trustees, or other officers appointed by Federal courts to conduct any business should be liable for local taxes applicable to the business conducted. In this state of affairs, Congress passed Section 124a, for the manifest purpose of putting at rest all doubt and uncertainty in this regard.
>
> "* * * * There were controversies between the state taxing authorities and the various liquidating agencies appointed by the Federal courts as to the liability for such taxes. Congress has, in the interest of justice or good will, by this Act directed the trustee to pay rather than litigate these tax claims. By the sweeping terms of this statute all doubts have been resolved in favor of the state taxes.".

In the memorandum of the decision on the petition for Order No. 398 (R. 17) in the Connecticut District Court it is stated that *Thompson* v. *Louisiana* is not applicable

because "No question of a lessee's liability for the lessor's obligation was there involved". This attempted distinction, which is also the theme of a large part of the petitioners' brief, is not, it is submitted, a valid one. The argument for which that case was cited, and for which it and *Boteler* v. *Ingels* are here cited, is not based on any relationship between lessor and lessee. It is based, instead, upon the clear duty imposed by statute upon the persons who undertake to operate a business enterprise in receivership or reorganization. If, because of the circumstances of this particular case, this may as a practical matter subject the property of a former lessee to the danger of some loss, that is simply one of the results of the position of the Trustees and has nothing to do with the principle behind the clear requirements of the law. (The irrelevancy of these considerations as an argument against the application of § 124a is dealt with at a later point in this brief, *infra*, 35.)

Without reliance on 28 U. S. C. § 124a, it has been held that § 124, which was passed long before, withholds from District Courts the power to authorize a disregard of local laws in regard to taxation.

Gillis v. *California*, 293 U. S. 62.

Although these statutes have done away with any uncertainty which might otherwise have existed, the principle which they declare is a well-established one.

MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574 (C. C. A. 2d, 1930).

Central Vermont Ry. Co. v. *Marsch*, 59 F. 2d 59 (C. C. A. 1st, 1932).

Hennepin County, Minn. v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453 (C. C. A. 8th, 1936).

The principle is well stated in *Hennepin County, Minn.* v. *M. W. Savage Factories, Inc.*, where Sanborn, Circuit Judge, said, at page 455:

> "It seems to be well settled that when receivers take over mortgaged real estate and use it for the actual or potential benefit of their trust estate, they are ordinarily obliged to pay current taxes as they accrue, whether the taxes are mere charges against and liens upon the property, as in Minnesota, or are the personal obligations of the owners. This is not because such taxes are debts of the insolvent or the trust estate, or because the receivers have assumed the obligations of the mortgagor to pay taxes upon the mortgaged premises, but because the receivers are operating the property, and current taxes are to be regarded as ordinary expenses of operation. To escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation.".

In the case at bar the Circuit Court of Appeals based its decision squarely on the direct duty imposed by 28 U. S. C. §§ 124 and 124a (R. 192). It felt that the clear provisions of those two statutes cut across any arguments which might otherwise be made, and relieved it of the necessity of deciding how these taxes should be classified if § 124a had not been passed. Thus, the court said, it was not necessary to decide whether these taxes were operating expenses (R. 192). It also said that it was not necessary to decide whether § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6) in and of itself required the lessee to pay these expenses (R. 192). We agree that § 124a has this simplifying effect, and that the argument might rest here. But it should be noted that the Circuit Court of Appeals did

not say, and we do not say, that §§ 124 and 124a are the sole reasons why the District Court was wrong. It merely says that they are such conclusive reasons that it does not need to examine the others. Therefore, while it seems advisable for us, in this argument, to examine these and other points which the Circuit Court of Appeals quite properly felt were not necessary to its decision, it should be borne in mind that such a discussion is merely supplementary to the argument resting on the clear requirements of §§ 124 and 124a. (The character of these taxes as current operating expenses is discussed below, at page 25. The relevancy and effect of § 77 (c) (6) are discussed below, at pages 21 and 41.)

Going further than the opinion of the Circuit Court of Appeals, we suggest that §§ 24 (1) and 66 of the Judicial Code (28 U. S. C. §§ 41 (1) and 125), quoted *supra*, 14 are additional reasons why Order No. 398 was wrong. Granted that under certain conditions a federal court in charge of a reorganization may properly issue injunctions which will "continue indefinitely to hold off the tax gatherer from taking direct action against the property" (see opinion, R. 192), and granted that the orders of the Connecticut District Court in this case have so far had that practical result, it does not follow that the Connecticut District Court acted in conformity to those two sections in this case. It would seem that those two sections were designed to leave local judicial and administrative machinery free to operate as far as possible without interference from federal courts, and that such interference can be justified only where it is absolutely necessary, and only for the purpose of changing the manner of enforcement of the local laws. In *Board of Directors of St. Francis Levee Dist.* v. *Kurn*, 98 F. 2d 394 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648,

cited in the opinion of the Circuit Court of Appeals (R. 192), the facts were different in several respects from those in the case at bar. In that case the taxing authorities had already started suits in the state courts, and the injunction of the federal court dealt with a specific proceeding. But, which is more important, the federal court merely restrained a specific type of interference with the property because it said that the remedy in the state courts was not adequate, and the federal court stated unequivocally that these very taxes should be enforced "just as would be done by the state courts of Arkansas in a proper case" (98. F. 2d at 397). In the case at bar the action of the Connecticut District Court was quite different. Without any showing of attempts by the local authorities to enforce the taxes by suit or other action, or that there was not an adequate remedy in the courts of Massachusetts, it issued blanket injunctions immediately on the approval of the reorganization petitions (R. 50, 82, 127), which effectively prevented any collection of the current taxes by the usual means, and then by Order No. 398 made it impossible for the taxing authorities to collect their taxes by the only other means left open to them. This action seems hardly to be in accordance with the intent of 28 U. S. C. §§ 41 (1) and 125, to say nothing of §§ 124 and 124a.

Pennsylvania v. *Williams*, 294 U. S. 176.
Baker v. *Atchison, T. & S. F. Ry. Co.*, 106 F. 2d 525, 529 (C. C. A. 10th, 1939), cert. den. 308 U. S. 620.

B. *The New Haven Trustees are the officers operating the properties to which these current local taxes are assessed.*

This seems to be clearly established. It is stated by the District Court in the memorandum on the decision accom-

panying Order No. 398 (R. 12, 15). The basis for it is found in the order approving the petition for reorganization of the Old Colony (Order No. 74, R. 81), the order appointing trustees of the Old Colony (Order No. 75, R. 85, 87), and the order requiring disaffirmance of the Boston and Providence lease (Order No. 217, R. 110, 112). It is also stated in a brief of the New Haven Trustees filed in the Supreme Judicial Court of Massachusetts (R. 156, 177).

It is clear from the foregoing orders and statements that the operation of the properties is by the New Haven Trustees *as such*, and not, as now suggested by the petitioners in their brief (pages 18–24), merely by the same individuals in a different capacity. Order No. 74, approving the reorganization of the Old Colony in the New Haven proceedings, directs that "the Trustees of the property of the Debtor continue to possess and operate the petitioner's property" (R. 81). Order No. 75 directs that the properties of the Old Colony be operated by "said Trustees of The New York, New Haven and Hartford Railroad Company, as such" (R. 87). Order No. 217 directs that the operation of the Boston and Providence properties "shall be conducted by the New Haven Trustees" (R. 112). These orders were made pursuant to the provisions of § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)), quoted *infra*, 48, which requires such operation after the rejection of a lease until the abandonment of the line is authorized by the Interstate Commerce Commission, where the judge decrees after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the line.

The reasons given for the decrees pursuant to this statute, and the other proceedings connected with them, show that it was an essential part of the whole arrangement that the New Haven Trustees as such should operate the properties.

They were given the management of the Old Colony and the Boston and Providence properties not by coincidence or because they were used to managing railroad properties, but for the very reason that they were Trustees of the property of The New York, New Haven and Hartford Railroad Company. The Old Colony was granted reorganization in the New Haven proceedings on the basis of a petition which alleged in part (R. 70):

> " * * * said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court * * * ".

The filing of that petition was authorized by the Board of Directors of the Old Colony (R. 71), and their election was controlled by the New Haven (R. 81). The order appointing trustees of the Old Colony (Order No. 75, R. 85) contains various recitals, already described (*supra*, 4), to the effect that the Old Colony property should continue to be operated as part of the New Haven system, even to the extent of mingling the funds, income, assets and equipment (R. 85–89).

As far as the taxes assessed upon property actually owned by the Old Colony and the Boston and Providence are concerned, nothing more needs to be said. As stated in the petition of the New Haven Trustees (R. 6), part of the current real estate taxes which Order No. 398 directed them not to

pay are assessed on such property, and, as has been shown above, the New Haven Trustees are operating that property under orders of the Connecticut District Court.

The taxes assessed upon the property of The Boston Terminal Company, while different in some respects, are nevertheless assessed to properties operated by the New Haven Trustees, and are as much expenses of operation of those properties and "applicable to such business" as are taxes on property actually owned by the Old Colony and Boston and Providence. The New Haven Trustees themselves seem to have assumed this in their petition for Order No. 398, at least as to the current taxes which are still unpaid (R. 6). Their basis for calculating the amount for which they might be liable if part of the taxes had not been paid may be mistaken (see *supra*, 9), but that point is not now important and they do not raise any question that the Old Colony and Boston and Providence estates are subject to payment of the unpaid balance of the current taxes on the Terminal Company property. The liability of the properties operated by the New Haven Trustees for the real estate taxes on the Terminal Company property can be arrived at by several methods under Chapter 516 of the Special Acts of Massachusetts of 1896 (*infra*, 48). Section 25 (R. 154) is as follows:

> "Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, *but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies*, and in the assessment of franchise taxes upon said railroad companies each of them shall be

deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act.". (Italics ours.)

The "said railroad companies" required to use the real estate of the Terminal Company are named in Section 2 of that Act (*infra*, 49) and include the Boston and Albany, the Boston and Providence, the Old Colony, and the New Haven. The taxes on the Terminal Company property have been assessed not only to the Boston and Providence and the Old Colony but also to the New Haven (R. 179, see note, *supra*, 8). There is considerable basis for arguing that the New Haven Railroad itself, not merely through the Boston and Providence and Old Colony, but directly as a part of the operation of its own system, is using the terminal facilities provided by The Boston Terminal Company even though assertions that it is not are contained in the petitioners' present brief (pages 14, 15). Statements to that effect appear in a brief of the New Haven Trustees (R. 156, 158, 159). A further basis for such a conclusion is found in Order No. 75 (R. 85) where it is stated that the interests of the public and the railroads require that the railroad lines and property of the Old Colony "be operated as an integral part of the system of railroads now being administered by the Trustees of The New York, New Haven and Hartford Railroad Company", and the power given to the New Haven Trustees in that same order (R. 89) "to deal with all the property subject to their control as a single railroad system". If it were necessary to do so, the obligation to pay these taxes could be found in the New Haven's own direct use of the terminal facilities. But this is not necessary because it is nowhere questioned that the Old Colony and the Boston and Providence are using them and

that the New Haven Trustees are also operating those lines as officers of the court. (See the statement to this effect in the District Court's memorandum (R. 15).)

C. *These taxes are current expenses, and not claims in bankruptcy proceedings.*

These taxes were assessed as of January 1, 1939.[1] The New Haven Trustees were originally appointed in 1935 (R. 53) and the present Trustees have continued since 1937 (R. 94). The New Haven Trustees were ordered to operate the Old Colony in 1936 (R. 81, 87) and to operate the Boston and Providence in 1938 (R. 112), and have done so continuously since then (*supra*, 7). The petitions for reorganization were approved for the New Haven in 1935 (R. 44, 62), the Old Colony in 1936 (R. 81, 83), and the Boston and Providence in 1938 (R. 126, 128). Thus, all the properties in question were in reorganization and being operated by the New Haven Trustees under orders of the District Court at the time when these taxes were assessed. It is clear that in these circumstances the taxes are not claims, such as those of creditors, but are as much a part of the operating expenses "as heat, custody or current upkeep", and as such are applicable to the business conducted by these officers of the court, within the meaning of the federal statutes.

Swarts v. *Hammer*, 194 U. S. 441.
Boteler v. *Ingels*, 308 U. S. 57.
MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, 576 (C. C. A. 2d, 1930).
Central Vermont Ry. Co. v. *Marsch*, 59 F. 2d 59, 60 (C. C. A. 1st, 1932).
Hennepin County, Minn. v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453, 455 (C. C. A. 8th, 1936).

[1] Similar taxes have been assessed as of January 1, 1940.

D. *Order No. 398 results in the non-payment of these taxes.*

The orders issued by the District Court for the operation of the properties of the Old Colony and Boston and Providence empowered the New Haven Trustees, and only the New Haven Trustees, to pay taxes and current operating expenses (R. 88, 112). These orders also gave the New Haven Trustees, and only the New Haven Trustees, the power to collect all the revenues from the properties (R. 87, 112). The orders approving the respective reorganization petitions contained injunctions designed to prevent any action against the property or procedure by suit or otherwise in state courts to enforce payment of the taxes. This appears to leave the taxing authorities without any means to enforce these taxes except by application to the Connecticut District Court for an order to the New Haven Trustees to pay them. But as that court has instructed the New Haven Trustees, by Order No. 398 (R. 20), to withhold payment of these very taxes, such an application would, as long as Order No. 398 stands, appear to be useless. Whatever may be the legal theories involved, the net result is that by virtue of various orders of the Connecticut District Court, culminating in Order No. 398, these taxes are not paid, and cannot be collected.

II

Order No. 398 was contrary to the express provisions of Massachusetts statutes and was an interference with Massachusetts laws.

The assessment and collection of the taxes on the properties owned by the Old Colony and Boston and Providence, which are mentioned in paragraph 4 of the petition for

Order No. 398 (R. 6), are controlled by general provisions of the statutes of Massachusetts. General Laws (Tercentenary Edition), c. 59 (Assessment of Local Taxes), c. 60 (Collection of Local Taxes). Chapter 59 contains provisions for abatements by the assessors upon application, and upon appeal to the Appellate Tax Board. (See Sections 59 through 65A.) In Chapter 60, Sections 16–22 provide for preliminary proceedings for collection, Sections 24–28 for collection by distress, Sections 29–34A for collection by imprisonment, Sections 35 and 36 for collection by suit, at any time after three months from its commitment to the collector, and Sections 37–60 for a lien upon the land for all taxes and incidental charges from January first in the year of assessment, and for collection by a sale or taking of the land to enforce this lien. These provisions are supplemented by Chapter 58A concerning the Appellate Tax Board, and also providing for appeals from that Appellate Tax Board to the Supreme Judicial Court. The payments mentioned in paragraph 5 of the petition for Order No. 398 (R. 6), consisting of real estate taxes, franchise taxes and bond interest in connection with the Boston Terminal Company, are all controlled by the special statute already mentioned, namely, Chapter 516 of the Special Acts of 1896 (*infra*, 48). The provisions of this statute have been summarized in the statement of the case at the beginning of this brief (*supra*, pages 7, 8). Section 25 of that statute, which provides for the assessment and payment of the taxes, is also printed in full on page 23 of this brief and page 154 of the Record. In addition to the remedies for non-payment of taxes, given by the general statutes of Massachusetts (see *supra*, page 10), and the usual remedies open to bondholders and mortgagees for the enforcement of the obligations running to

them, the Special Act of 1896 contains, in Section 10 (*infra*, 53), a special provision giving the Supreme Judicial Court of Massachusetts jurisdiction in equity to compel payments by the several railroads to the Terminal Company of the amounts necessary to pay the various expenses, including taxes and the interest upon its bonds. This remedy seems to be cumulative and in addition to all other ordinary remedies.

Thus, it will be seen that the whole subject of the payments mentioned in paragraphs 4 and 5 of the petition for Order No. 398 is covered, at least as far as Massachusetts is concerned, by Massachusetts statutes and laws, and that a complete system is provided for their determination and enforcement. It should be noted particularly that provisions are made for the adequate determination of the validity and fairness of any taxes assessed, and for a reduction of these assessments if they are excessive. This provides a unified system of determination by expert local and state agencies, with review by the highest court of the state.

Order No. 398, taken together with the injunctions previously issued (R. 50, 82, 127), is an attempt not only to stop all the machinery of this unified Massachusetts system, but to prevent the carrying out by any agency of the obligations imposed by these statutes. In effect, it directs the New Haven Trustees not to comply with them, and does not provide for any other compliance or enforcement. As far as the taxes are concerned it was apparently expected by the court that there would be no compliance with the obligations of the statutes, for the memorandum of the decision on the petition for Order No. 398 states that "there is no pretense here that failure to pay the taxes in question on the due date will result in an interruption of operation" (R. 17).

III

There was no legal basis for this overriding of federal and state laws by the District Court.

One difficulty in considering Order No. 398 is that of finding the procedural basis on which it was made. Before considering whether its substance was in accordance with statutes and cases, or whether it was a proper exercise of discretion, we ought to find some authority, express or implied, requiring the Connecticut District Court to make such an order on application by the New Haven Trustees, or to exercise its discretion on the merits. There does not seem to be any such authority. The Constitution of the United States provides, in Article X of the Amendments, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There does not seem to be anything in the Constitution or in the laws made pursuant to it, which delegates any such power as the District Court purported to exercise by Order No. 398.

A. *The Bankruptcy Act does not confer any such power.*

The only apparent justification for any such action under the Constitution of the United States would seem to rest on Article I, § 8, giving Congress the power to establish "uniform laws on the subject of Bankruptcies." But the action by Congress under that provision of the Constitution does not seem to have contemplated this kind of order.

Section 77 of the Bankruptcy Act (11 U. S. C. § 205) contains no specific provision for an order of this kind, and there does not seem to be anything in that section from which power to make such an order can be implied. The only possibility is § 64a (11 U. S. C. § 104a), but that deals

with debts which are to have priority in the payment out of a bankrupt estate, which is quite a different thing from current taxes assessed after the appointment of a trustee in a railroad reorganization proceeding.

MacGregor v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d, 574, 576 (C. C. A. 2d, 1930).

Even without that distinction, the failure of Congress in § 77 to make any specific provision for interference with local affairs such as was made by this order is a strong ground for saying that it did not intend any such interference.

See *Swarts* v. *Hammer*, 194 U. S. 441.
Bowler v. *Ingels*, 308 U. S. 57.
Palmer v. *Massachusetts*, 308 U. S. 79.

In *Swarts* v. *Hammer*, Mr. Justice McKenna said (at page 444):

> "By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.".

Palmer v. *Massachusetts*, it is true, dealt with the attempted interference by a federal court with a different local agency — the Department of Public Utilities — but the language of

the decision applies with equal force to analogous interference by Order No. 398. The limited application of § 77 as a bankruptcy statute is explained in the following words of Mr. Justice Frankfurter (308 U. S. 86):

> "Not only is there no specific grant of the power which the District Court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act. But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

That the reasoning in this case is not confined to a particular local agency such as the Department of Public Utilities is shown by footnote 17 on page 90 of that case, part of which reads as follows:

> "Section 65 of the Judicial Code (36 Stat. 1104, 28 U. S. C. § 124) decisively indicates that Congress did not intend that those who operate a business under

the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.".

This is in accord with *Gillis* v. *California*, 293 U. S. 62.

In addition, not only as a statement of law on the technical question but also as a statement of general principle, on the matter of conflicting jurisdiction, applied to this very reorganization, the following further quotation from *Palmer* v. *Massachusetts* is pertinent (308 U. S. 83):

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.".

B. *This was not a legal declaratory judgment.*

As has already been pointed out (*supra*, 15), it is possible in a railroad reorganization to get a ruling by a District Court on a matter of this kind by a proceeding under the federal Declaratory Judgment Act (28 U. S. C. § 400). This was done in *Thompson* v. *Louisiana*, 98 F. 2d 108 (C. C. A. 8th, 1938), on a proceeding initiated by the state taxing authorities. But there is no indication in the Record

in the case at bar, nor any intimation elsewhere, that Order No. 398 was issued in any such proceeding. Instead, the New Haven Trustees asked the court to issue that order, and there does not seem to have been any discussion of the court's authority to make it. But, while no steps were taken to make the City of Boston a party, as a practical matter the order is as conclusive as a legally binding adjudication, because the City cannot, without going contrary to the terms of the various injunctions (R. 50, 82, 127), enforce its rights by the other remedies provided by state law; and the District Court which has power to issue an order for payment of the taxes, upon an application by the City, is the same one which has issued Order No. 398. Thus we have a declaratory judgment as practical matter, but without reliance on the federal act which might provide a legal basis for jurisdiction by the District Court.

C. *This interference by the federal court was contrary to established policy where state agencies are concerned.*

Even if it might be possible to find some technical basis for jurisdiction of a District Court to interfere with the application of local laws in a situation of this kind, the District Court should not have exercised it in this case, but should have left the matter to be worked out by the local agencies — at least until there had been some demonstration of difficulty. This has been a firmly established policy declared by the cases.

Pennsylvania v. *Williams*, 294 U. S. 176, 183, 185.
Thompson v. *Magnolia Petroleum Company*, 309 U. S. 478.

See also Warren, *Federal and State Court Interference*, 43 H. L. R. 345, 375, 378.

Where, as here, the federal court which is asked to interfere is located outside the state whose laws would be affected, there is even a stronger reason for keeping its hands off.

Palmer v. *Massachusetts*, 308 U. S. 79, 89.

It is suggested in a footnote to the article in 43 H. L. R. 345, at page 378, that an aid to the solution of this delicate problem of conflicting jurisdiction would be the setting up of adequate machinery in the states for settling questions of taxation, and correcting injustices. The machinery provided by Massachusetts for these purposes seems to be about as complete as could be asked. It has already been described briefly above at page 27. There has been no suggestion that it is inadequate for the determination of any questions in regard to the application of these taxes. Ordinarily, under these circumstances, the remedies provided by the state laws would first have to be exhausted before a federal court could interfere.

First National Bank of Greeley v. *Board of County Commissioners*, 264 U. S. 450.

It should be noted that the taxes which the New Haven Trustees were ordered not to pay were assessed directly to the New Haven itself, as well as to the Old Colony and Boston and Providence (R. 179, *supra*, 8). Apart from any other basis of liability, this in itself imposed a liability on the New Haven Trustees to pay them. If the Trustees felt that this assessment was erroneous for any reason, they had ample opportunity to get relief through the administrative and judicial machinery provided by Massachusetts

laws. There was no ground for interference by a federal court until they had at least made an attempt to use this machinery or show that it was inadequate.

It may be said that Order No. 398 was not intended to be an interference with the laws of Massachusetts, but merely a direction to the New Haven Trustees in their dealings between the various estates in their hands. But the wording is not so limited — it is to "withhold the payments listed in Paragraphs 4 and 5 of said petition" (R. 20), and these paragraphs describe taxes which are said to be, or about to be, "due and payable" (R. 6). That the petitioners and the District Court expected as a practical matter that the taxes would not be paid is shown by the petitioners' statement that the payments would not be essential to their operation of the railroads (R. 10), and the statement in the District Court's memorandum that they are "an expense which is not indispensable to the continuance of operation" (R. 17); and the only possible legal effect was to make it impossible for the City of Boston to collect its taxes. The net result was an interference with state laws which could not be justified by the circumstances.

D. *The possible effect on the New Haven estate is not a relevant consideration in determining the validity of Order No. 398.*

The requirements of the Massachusetts statutes imposing these taxes are clear. The requirements of the federal statutes that taxes so imposed be paid are also clear. They apply to the New Haven Trustees, who, as such, are operating these properties. There is no provision in those laws making the collection of taxes contingent on the existence of sufficient funds in the hands of the operators, or the lack of financial strain on those who may be affected by their payment.

Therefore, the arguments based on the possible effect on the New Haven estate do not seem relevant.

The contention that the lack of funds in the estate which is being operated should be an excuse for non-payment has been treated in *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, where L. Hand, Circuit Judge, said (at page 576):

> "The taxes accruing after the receivers entered are in a different position. They could have refused to accept the mill, if they had thought the equity a burdensome asset. Having elected to enter, they took it *cum onere*, and the taxes, which were a condition upon their continued occupation, were as much a part of their expenses as heat, custody or current upkeep. So far as we have found, courts have universally regarded them as part of the receivers' expenses, when the question has come up. * * * * It would be a curious doctrine which allowed the general creditors to avoid them because their venture turned out badly; their representatives must consider that at the outset. Every consideration of equity requires them to bear all charges incidental to the occupation which they have enjoyed."

The foregoing quotation is adopted with approval in *Central Vermont Ry. Co.* v. *Marsch*, 59 F. 2d 59, where Bingham, Circuit Judge, said (at page 62):

> "Counsel for the appellants seek to distinguish these cases on the ground that in New York state there is a lien for real estate taxes and therefore they are not applicable to the situation here. But in Massachusetts, where these taxes arose, taxes assessed upon land are a lien thereon. 1 General Laws of Massachusetts, c. 60, § 37."

In *Ingels* v. *Boteler*, 100 F. 2d 915, which was affirmed in *Boteler* v. *Ingels*, 308 U. S. 57, there was some question

as to whether the business then being run by a trustee in bankruptcy had enough funds with which to pay the license fees and penalties imposed by the state law, but the court held that that was no reason for not paying. When the case reached this Court that point was not even considered, for this Court held that the provisions of the Act of June 18, 1934 (28 U. S. C. § 124a), settled the matter. In *Gillis* v. *California*, 293 U. S. 62, the receiver was unable to get a surety on the bond required by state taxing authorities. This Court held that an order of the District Court purporting to relieve him of this necessity was invalid in the face of the clear requirements of 28 U. S. C. § 124. But in spite of this clear declaration of the statutes and the cases interpreting them, the possibility of loss as a result of making the payments seems to have been the controlling reason in the mind of the District Court in issuing Order No. 398. In the memorandum of the decision on the petition for Order No. 298 that court said (R. 13):

> "The cash outlay involved has all come from the New Haven estate and, subject in part to outstanding Old Colony bonds, has been charged as a prior lien against the estates of the lessors. The propriety of such charges has been finally adjudicated with respect to the Old Colony estate; I see no basis for differentiation with respect to the charges against the Boston and Providence estate. Heretofore no serious objection has been presented to the court to such use of New Haven funds. But the continued operation of the lessor properties at great loss and the resulting accumulation of liens as aforesaid has now so impaired their respective capital accounts that the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security

holders having the beneficial interest in the funds advanced. And the factual basis for this view was not questioned at the hearing.

"There are outstanding secured obligations of the New Haven on which the aggregate interest in default is upwards of $40,000,000. Representatives of these security holders appeared at the hearing in opposition to further advances for the purposes stated from New Haven funds. On fundamental principles of equity it is wholly clear that in the situation as it has now developed the court may not properly subject these equities to the hazard of further advances. The advances must be withheld unless required by some mandatory obligation resting on the New Haven trustees.".

It is submitted that the District Court in making Order No. 398 paid too much attention to "the hazard of further advances", which the cases cited show is not a relevant consideration, and did not pay enough attention to the fact that these advances were "required by some mandatory obligation resting on the New Haven trustees".

It should be noted that there is nothing in the record to show with certainty that there is no money available or coming in from which these payments can be made. Order No. 75, empowering the New Haven Trustees to collect "the accounts, revenues, income, rents, profits and tolls accrued from" the railroads and properties of the Old Colony (R. 87), and Order No. 217, empowering the New Haven Trustees to conduct the operation of the Boston and Providence properties for the account of the Old Colony estate (R. 112), are still in force, and it is obvious that as long as freight or passenger trains are run by those railroads there is at least some income available to the New Haven

Trustees. There is nowhere any mention of the possibility of raising the necessary cash by the common device of receivers' certificates and it does not appear that the cash is not still actually available without going to that length. All that appears is that (R. 13) "the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security holders having the beneficial interest in the funds advanced". The suggestion that this is a reason for a federal court order not to pay current taxes seems to be a repetition of the one described in *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.*, 39 F. 2d 574, 577 as a "curious doctrine" (*supra*, 36).

While we still maintain that the effect on the New Haven estate is irrelevant here, and that the leases have nothing to do with the requirements of the federal statutes, any argument based on the hardship to the New Haven estate is unconvincing as well as irrelevant. The Old Colony and Boston and Providence are still part of the New Haven system, and are being operated by the New Haven Trustees as such because the District Court was of the opinion that the continuity of that system should not be disturbed (R. 85, 87), and because those two railroads are wholly without any operating organization (R. 112). But this situation is one for which the New Haven management is responsible. They were an independent system when the New Haven entered into the lease of their property (R. 72). There is no suggestion that the New Haven system as a whole should not continue in operation. Under these circumstances it might well be regarded as reasonable if the Interstate Commerce Commission or other administrative agency having jurisdiction should refuse to allow the New Haven to escape the

obligations which it assumed when it entered into the lease, merely because those parts of it have become unprofitable.

See *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262.

That question does not need to be decided here, but is mentioned merely to show that the present situation whereby the New Haven Trustees are operating the roads under § 77 (c) (6) of the Bankruptcy Act (11 U. S. C. § 205 (c) (6)) is not without some foundation of voluntary action by the persons who are financially interested in the New Haven estate. This is not a case where, as suggested in the petitioners' brief (p. 23), the New Haven Trustees "happen to be trustees" of two separate estates. The whole situation was planned deliberately, and is based on the voluntary act of the New Haven in taking the Old Colony and the Boston and Providence into its system originally. If there were no reorganization the New Haven would still be responsible for the Old Colony and the Boston and Providence. It is no hardship, therefore, to require it to continue its responsibility for a while during those proceedings — at least until the proper administrative body allows the New Haven to relinquish it. And there is nothing in the Record to show that this operation of the Old Colony and Boston and Providence properties was assumed against the will of the New Haven security holders. There is some basis for a contrary conclusion from the request by the Old Colony that the New Haven Trustees operate it (R. 70), and the fact that the New Haven controlled the directors of the Old Colony who authorized the Old Colony's request (R. 81).

The explanation just made is not, however, a necessary reason for the liability which results from the federal statutes. It merely shows that in this case the liability is not a hardship. It is interesting, but not necessary, to find out *why* the New Haven Trustees, as such, are operating the properties to which the taxes of the City of Boston are applicable. The fact that is significant is that the New Haven Trustees, as such, *are* operating the property, and hence they are the people who, under those statutes, are required to pay them.

Order No. 398 is not limited in its effect to the estates of the three railroads. If it were, there might be some basis for the petitioners' arguments referring to the leases. But it goes further than that, and stops payment of obligations which are in no way founded on the leases. In this respect it is distinguishable from *In re Reorganization of Pittsburgh Rys. Co.*, 111 F. 2d 932 (C. C. A. 3rd, 1940), certiorari granted October 14, 1940, which as *Philadelphia Company* v. *Dipple*, Oct. Term, 1940, Nos. 242, 243, is assigned for argument immediately following the case at bar.

In the *Pittsburgh Rys.* case, the only obligation that the trustees of the debtor had in regard to the operation of the underlying companies was founded on leases and on contracts. The reorganization was one under Chapter X of the Bankruptcy Act (11 U. S. C. § 501) instead of § 77, and hence the trustees were not operating pursuant to a requirement of law such as § 77 (c) (6) (11 U. S. C. § 205 (c) (6)). The court did not cite 11 U. S. C. § 124a. In the case at bar there can be no question that the operation of the properties to which the taxes are assessed is by order of a United States court. The leases may have been one of the reasons why the orders for operation were made, but the obligation

of the New Haven Trustees to the City of Boston for the taxes rests, not on the leases, but on the fact that they are operating the properties pursuant to orders of the federal court.

In regard to this same situation it was held that the Connecticut District Court, in order to assure the continuance of the rail service, could grant a lien on the operated property in its custody.

Warren v. *Palmer*, 310 U. S. 132, 139, 140.

But it is not intimated in that case, and there is no basis for saying, that the court having custody could go beyond this method of inducement and, in its discretion, relieve the agents operating the properties from paying current operating charges by nullifying state laws.

The case of *Dulberg* v. *Zankel*, 67 F. 2d 534 (C. C. A. 2d, 1933) cited in the petitioners' brief (page 25), is likewise distinguishable from the case at bar in several respects. On the point for which it is cited by the petitioners, the distinction is found in the fact that while there was one receiver, he was not authorized to operate one property in his capacity as receiver of another. In the case at bar the New Haven Trustees *as such* were managing the property of each of the companies and the obligation to pay the taxes was imposed upon them in that capacity. At the time of the decision in *Dulberg* v. *Zankel*, 11 U. S. C. § 124a was not in effect. As that decision was by the same Circuit Court of Appeals which reversed Order No. 398 on the basis of §§ 124 and 124a, it is reasonable to suppose that the court was cognizant of that case and that its failure to cite it, referred to in the petitioners' brief (page 24), was because it did not consider it to be relevant.

IV

The unjustifiable hardship imposed on the City of Boston by Order No. 398 makes that order an abuse of discretion.

It is a well-established principle that the very existence of the government itself is dependent upon its power to obtain without delay sufficient revenue to carry on its functions. Therefore, imperative necessity has forced a distinction between claims for taxes and all other claims, and has recognized the right of the government to collect taxes in a summary manner.

> *Murray's Lessee, et al.* v. *Hoboken Land & Improvement Co.*, 18 How. 272.
>
> *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589.

It is a common thing for governments to provide for the summary collection of taxes, and this procedure has been followed in Massachusetts. (See General Laws of Massachusetts [Tercentenary Edition], c. 60, §§ 19, 24, 27, 29, 35, 37–55.) The federal statutes which we have been discussing seem to show a congressional recognition of this necessity for immediate revenue. The City of Boston is not different in this respect from other governments or their subdivisions.

Although taxes on property in receivership or reorganization are regarded as expenses of administration as much as any other current expenses (*supra*, 25), there is one difference between taxes and other operating expenses. Those persons or companies who furnish labor, fuel, supplies, and other facilities necessary to the operation of the rail-

roads, can at least refuse to furnish them any longer if they do not receive payment for them. But the cities must continue to furnish police and fire protection and the other municipal services for which taxes supply the funds, even though these particular taxes are not paid. This is not contemplated by law but is directly opposite to the intention of the law.

See *Swarts* v. *Hammer*, 194 U. S. 441, 444.

Ordinarily, the city might enforce its lien or collect its taxes by suit or by the various other methods provided by local statutes. But in view of the injunctions issued in these reorganization proceedings (R. 50, 82, 127) these remedies may be of no practical value. This practical difference between taxes and other current expenses seems to have been recognized in the issuance of Order No. 398, for the court states in the memorandum (R. 17):

> "And there is no pretense here that failure to pay the taxes in question on the due date will result in an interruption of operation."

The only reason why this failure will not result in an interruption of operation is because the local authorities are helpless to exert the power which the law gave to them, and that they must continue, until they can find some solution, to incur expense for municipal services for the benefit of these operations without receiving the taxes which help to pay for those services. The other taxpayers of the city are obliged to contribute currently to municipal expenses, and they are now asked to bear an additional burden, apparently because, as the court says in the memorandum (R. 13):

"the New Haven trustees report that they cannot say with complete assurance that the lessor estates are adequate to support further advances without jeopardy to the New Haven security holders having the beneficial interest in the funds advanced.".

It would seem that some of the federal statutes referred to above were intended for just this situation. When the New Haven Trustees asked the Connecticut District Court which appointed them for advice as to their duty in regard to the taxes, the court might have called attention to the criminal penalties provided in 28 U. S. C. § 124 (*supra*, 13), and the specific mandate of 28 U. S. C. § 124a (*supra*, 13), and then told the petitioners that the only order that it could make was that they should pay the taxes. It could have quoted, as a statement of its duty, the following from *Hennepin County, Minn.* v. *M. W. Savage Factories, Inc.*, 83 F. 2d 453, 457:

"If the trustees can still secure a reduction in the amount of the taxes assessed, they should be permitted to do so, but the court below should see to it that these taxes, in so far as they are valid liens upon the real estate, are paid by the trustees.".

But the court did not do that. Instead, it made an order telling them not to pay the taxes. It is submitted that that order was invalid. To give it any validity would result in a situation aptly described in the following words of Mr. Justice Cardozo in *Michigan* v. *Michigan Trust Company*, 286 U. S. 334 (at page 345):

"* * * * To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the state and a reproach to equity.".

By Order No. 398 the City of Boston is left with no rights — not even theoretical ones. In making that order the District Court looked only at the possible hardship on the New Haven estate and disregarded the certain hardship on the City of Boston. If the situation was one where the District Court had any right to exercise its discretion, the order which it made was clearly an abuse of discretion.

See *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, 84, 87.

CONCLUSION

The City of Boston, which appears as *amicus curiæ* in this case, is not concerned with the various obligations between the estates of the Old Colony, Boston and Providence, and New Haven railroads based on the leases made in 1888 and 1893. It is not a party to the reorganization proceedings pending in the Connecticut District Court where Order No. 398 was made. It had nothing to do with the disaffirmance of those leases, nor with any of the questions arising out of their disaffirmance. But under the clear provisions of the statutes of Massachusetts the City of Boston is entitled to receive taxes assessed on the properties of some of those railroads which are being operated by the New Haven Trustees. Specific provisions of federal statutes require those Trustees to pay those taxes. In the face of these requirements the Connecticut District Court, upon the application of the New Haven Trustees, and without making the City of Boston a party to the proceedings, by Order No. 398 purported to relieve the New Haven Trustees from the necessity of paying the taxes. As the New Haven Trustees are the only persons from whom the City of Boston can, consistently with other orders of the Connecticut District Court, obtain payment of its taxes, and as

the New Haven Trustees will not pay them as long as Order No. 398 remains in effect, that order has deprived the City of Boston of all theoretical and practical chances to obtain payment of them.

In the proceedings on the appeal from Order No. 398 by others, the City of Boston as *amicus curiæ* submits that as there was no express or implied basis to be found in the Bankruptcy Act, or elsewhere, for this overriding of federal and state laws; as this interference by the District Court was contrary to the established policy in cases concerning state agencies; as the possible effect on the New Haven estate, which was given as the principal reason for the issuance of the order, was not a relevant consideration; and as the unjustifiable hardship imposed on the City of Boston was an abuse of discretion; the Circuit Court of Appeals was right in reversing the action of the District Court.

Respectfully submitted,

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Counsel for the City of Boston as amicus curiæ.

APPENDIX

Bankruptcy Act, § 77 (c) (6) (11 U. S. C. § 205 (c) (6)):

"'If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49.'"

Massachusetts Special Acts, 1896, c. 516:

AN ACT TO PROVIDE FOR A UNION STATION FOR PASSENGERS ON RAILROADS ENTERING THE SOUTHERLY PART OF THE CITY OF BOSTON.

SECTION 1. Charles F. Choate, William Bliss, William T. Hart, Royal C. Taft, and Charles P. Clarke, their associates and successors, are hereby made a corporation by the name of The Boston Terminal Company, with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith.

SECTION 2. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

SECTION 3. The immediate government and direction of the affairs of said terminal company shall be vested in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner. The trustees shall elect one of their number to be chairman, and may elect another to be vice chairman, and shall choose a clerk who shall be sworn, and a treasurer who shall give bond in the sum required by the by-laws, with surety, for the faithful discharge of his duties.

SECTION 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly, to such an amount as may be necessary and as may be approved by the board of railroad

commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interests of of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

SECTION 5. Said terminal company may purchase or otherwise take in fee the whole or any part of the land in the city of Boston within the following limits, that is to say: — Beginning at the easterly corner of Atlantic avenue and a way called Summer street, thence bounded by the northerly line of said way extended to Fort Point channel; thence by said channel to Broadway; thence by Broadway to the westerly line of Lehigh street; thence by the westerly line of Lehigh street and by South street, Kneeland street and

the westerly line of Cove street extended to Federal street; thence by the westerly line of Federal street to Summer street, and thence across public ways to the point of beginning; and may discontinue and occupy for its purposes all streets and rights of way embraced within the land so acquired: *provided, however*, that no land belonging to the Boston and Albany Railroad Company or to the Old Colony Railroad Company shall be taken by said terminal company without the consent of the directors of both of said railroad companies; and *provided, further*, that the portion of Federal street to be discontinued under the provisions of this act shall not be closed to travel prior to the completion of the extension of Summer street and the extension of Dorchester avenue hereinafter provided for, and the opening of the same to travel, unless a temporary provision for the travel over such portion of Federal street, so that the travel shall not be interrupted, is provided for in some manner approved by the mayor, such temporary accommodation to continue until the completion of said Dorchester avenue and Summer street, and *provided, further*, that if said terminal company shall take for the purpose of this act any part of the land within the limits before described, owned by the Boston Gas Light Company, it shall take the whole of the land owned by said Boston Gas Light Company within said limits.

SECTION 6. Said terminal company, upon the passage of this act, shall forthwith organize, and thereupon the trustees thereof shall at once prepare plans and specifications for the construction of a union passenger station upon land hereinabove authorized to be taken, adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the companies and of the public, exhibiting its form, dimensions of walls, rooms

and partitions, and arrangements, and its location with reference to the adjacent streets and to the tracks of all said railroad companies located or proposed to be located in the vicinity thereof, and any projections over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The trustees shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require. Said station shall be constructed by the terminal company according to the plans thus approved by the board of railroad commissioners, or as the same may be changed, as hereinafter provided. The supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce the provisions of this section.

SECTION 7. Said terminal company, within three months after the plans of said union station are approved as above-provided, shall file in the registry of deeds for the county of Suffolk a location of the lands hereby authorized to be taken by it, or of such part thereof as it then deems it necessary to acquire, and shall proceed with all reasonable diligence to the construction and completion of such union passenger station according to said plans. But the trustees of the terminal company may from time to time propose to the mayor of Boston any changes in said plans, and the mayor shall forthwith approve or disapprove such changes in writing, and the trustees shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and to the railroad companies, and a

hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require.

SECTION 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and a hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law.

SECTION 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for as may be reasonably necessary for their respective use.

SECTION 10. Said railroad companies hereby required to use said union station shall pay to the terminal company

for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process.

SECTION 11. In order to render the union station and passenger facilities herein provided to be constructed and maintained by the terminal company accessible and convenient for public use, the following changes shall be made by the board of street commissioners of the city of Boston in its streets and public places, to wit:— Lehigh street between South street and Broadway bridge shall be discontinued; Cove street shall be widened to the width of at least one hundred feet, and extended at the width to which it may thus be widened to Summer street extended as required by this act; all of Federal street between Essex street and Federal street bridge which is not embraced within land which the terminal company is authorized to take, or which is not included in the above widening or extending of Cove street, shall be discontinued; Summer street shall be extended at least one hundred feet in width from Purchase street to the harbor commissioners' line; Dorchester avenue shall be extended over Federal street bridge, and thence laid out at a width of ninety-two feet, upon land which the terminal company shall convey to the city without compensation, substantially parallel with the harbor commissioners' line, to Summer street so extended, and said terminal company shall convey in fee to the city such of its land acquired under this act as may be required by said street commissioners for said widening and extension of Cove and Summer streets, at its actual reasonable cost to said terminal company; Albany street and Broadway, and the bridges thereof over the Boston and Albany tracks, shall be changed so as to enable the two southerly main tracks and two additional main tracks south of them to be extended thereunder to the grounds of the terminal company. Said board of street commissioners shall discontinue, widen, and lay out said

streets in such manner as may be approved by the mayor, and said city shall construct said streets and make said changes in said bridges as above-specified: *provided, however*, that the terminal company shall construct a bridge for the accommodation of foot passengers or a subway from the end of the new Cove street to meet Dorchester avenue at a convenient place, as determined by the railroad commissioners and street commissioners, sitting jointly, whenever said commissioners deem it necessary. The supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section.

SECTION 12. Said terminal company and the city of Boston may each release to the other any land which may be necessary for the uses of said terminal company, or for public ways or places respectively, upon such terms as may be agreed upon between the trustees of the terminal company and the mayor and the board of street commissioners of said city; and said railroad companies may convey to each other any land or interest in land in Boston owned by them respectively, which it may be found proper to transfer for convenience in the approach to or use of the station and grounds of said terminal company.

SECTION 13. For the purpose of paying any expenses incurred by the city of Boston in carrying out the provisions of this act the city council of said city may from time to time, on the request of the mayor, authorize the city treasurer to issue notes, bonds or scrip of said city to the amount specified in any such request, for a term or terms not exceeding thirty years from the date thereof, provided the sum total of such amounts shall not exceed two million dollars. If the city council shall not within thirty days after a request from the mayor authorize the loan requested, then the city treasurer of said city shall, on the request of the mayor,

issue and sell notes, bonds or scrip of said city, for the purpose of paying such expenses which shall be outside of the debt limit, and shall be for such terms not exceeding five years, as said treasurer shall determine, provided that the amount of said loan shall not exceed two million dollars. All such notes, bonds or scrip, whether inside or outside of the debt limit, shall be negotiable, shall bear interest payable semi-annually, shall be registered or with interest coupons attached, and shall be sold and disposed of in such manner, at such times, at such prices, in such amounts, and at such rates of interest not exceeding four per cent. per annum, as said treasurer may determine; and any premiums received by said treasurer in the sale of any of said notes, bonds or scrip shall, if the notes, bonds or scrip are issued for a term of ten years or more, be paid to the board of commissioners of sinking funds of said city, and be by them placed in the sinking fund for the redemption of the loan created; otherwise they shall be applied to the payment of said notes, bonds or scrip, or to the payment of said expenses, as the mayor may determine.

SECTION 14. The board of street commissioners of the city of Boston shall, within two years after the completion of said union station, assess upon any real estate in the city of Boston which in the opinion of said board receives any benefit and advantage from the location and construction of said union station, Summer street and Cove street, beyond the general advantage to all real estate in said city, a proportionate part of one half of the expense incurred by said city therefor, but in no case exceeding such benefit and advantage: *provided, however*, that said terminal company shall convey in fee to said city all the lands easterly of the westerly line of Dorchester avenue extended, without requiring any compensation therefor, and all the land except the

piece between Purchase street and Atlantic avenue required for the laying out, widening and extension of Cove street and Summer street, at its actual reasonable cost to said company; and the city of Boston shall assume all such assessments which may be assessed upon land of said terminal company, or of either of said railroad companies, held for railroad purposes. Except as otherwise provided in this section, sections two, three, five, six, seven and eight of chapter fifty-one of the Public Statutes shall apply to assessments under this section.

SECTION 15. The Union Freight Railroad Company shall, upon the request of the terminal company or of the mayor of Boston, remove its tracks on Federal street as now existing, and relocate and maintain the same on Dorchester avenue as extended under this act, Summer street extended, or on Cove street and Summer street to Atlantic avenue, or on either of said routes, as they are or shall be established and constructed under the provisions of this act, with the same powers and privileges and subject to the same duties, restrictions and liabilities now existing as to said tracks as located in their present location, upon such locations and in such manner as may from time to time be approved by the mayor, and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 16. The West End Street Railway Company shall, upon the request of the terminal company or of the mayor of Boston, remove its tracks on Federal street as now existing between Summer street and Federal street bridge, and relocate and maintain the same, with all necessary turn-outs and connections on Summer street as extended, on Dorchester avenue as extended and on Cove street as

widened and extended under this act, upon such locations and in such manner as may be from time to time approved by the mayor; and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 17. The New England Railroad Company, for the purpose of connecting its road with the union station herein authorized to be constructed, may extend its road from a point in the city of Boston as near the northerly end of its South Bay drawbridge as it may find practicable, to said terminal company's grounds, and for that purpose may purchase or otherwise take in fee a strip of land not exceeding thirty feet in width through the land and location of the Old Colony Railroad Company, parallel to its main tracks as they may be then located, subject however to the right of the Old Colony Railroad Company to cross the same; and the New England Railroad Company, the Old Colony Railroad Company and the Boston and Providence Railroad Corporation may jointly or separately construct such bridges across Fort Point channel as may be required for the adequate connection of their roads with each other and with the grounds of the terminal company, the plans thereof to be approved by the harbor and land commissioners; and said New England Railroad Company may use the proceeds of bonds issued under its mortgage made the second day of September in the year eighteen hundred and ninety-five, and recorded with Suffolk county deeds on the twelfth day of September in the year eighteen hundred and ninety-five, to pay any expenses incurred by it under the provisions of this act.

SECTION 18. The Boston and Providence Railroad Corporation, for the purpose of connecting its road with the union

passenger station hereby required to be constructed, may extend its road from a point at or near Dartmouth street to said terminal company's grounds, and thus abolish the grade crossing of its road and the road of the Boston and Albany Railroad Company, and for that purpose may purchase or otherwise take in fee within seven years after the completion of said union passenger station, or within such further time as said corporations may with the approval of the railroad commissioners agree, a strip of land on the southerly side of and adjacent to the main tracks of the Boston and Albany Railroad Company as they shall be then established, not exceeding one hundred feet in width; but it shall not take any land of the Boston and Albany Railroad Company within seven feet of the main tracks of the railroad of that company as then existing, without the consent of the directors of that company. And for the purpose of providing a station and facilities for passengers and public accommodation as hereinafter provided, in substitution for its present passenger station and facilities at Park square, which such change of its road to enable it to use the union station will require to be abandoned, the Boston and Providence Railroad Corporation may purchase, or otherwise take in fee, any land within the following limits, to wit:—Bounded by land of the Boston and Albany Railroad Company, Columbus avenue, and Buckingham, Dartmouth, Harwich and Yarmouth streets, and the land now of the Boston and Providence Railroad Corporation, and any other land adjacent thereto, within such limits as the board of railroad commissioners may upon hearing in writing prescribe; and said corporation shall file a location of the land hereinbefore authorized to be taken by it, or of so much thereof as it then deems it necessary to take, in the registry of deeds for the county of Suffolk, within three

months after the plans for such station and facilities are approved as hereinafter provided, and shall thereupon, either alone or with the Boston and Albany Railroad Company, if they so agree, proceed with all reasonable diligence to the construction of a passenger station thereon as herein provided.

SECTION 19. The Boston and Providence Railroad Corporation shall, within six months after said terminal company files its first location of land herein authorized to be taken for the construction of a union passenger station, prepare plans and specifications for the construction of a passenger station and approaches thereto and facilities for passengers and public accommodation, which shall be an adequate substitute for its present passenger station and facilities at Park square, and adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the railroad and the public, exhibiting its form, dimensions of walls, rooms, and partitions and arrangements, and its location with reference to the adjacent streets and to the tracks of all railroad companies located or proposed to be located in the vicinity thereof, and any projection over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval who shall forthwith approve or disapprove them in writing. The Boston and Providence Railroad Corporation shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require. Said station, approaches and facilities shall be constructed and provided by the Boston and Provi-

dence Railroad Corporation according to the plans thus approved by the board of railroad commissioners, or as the same may be changed as hereinafter provided, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section. But the Boston and Providence Railroad Corporation may from time to time propose to the mayor of Boston any changes in the plans for said station, approaches and facilities, and the mayor shall forthwith approve or disapprove such changes in writing, and the corporation shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require.

SECTION 20. The Boston and Providence Railroad Corporation and its lessees, upon the completion of said union station and of the station or stations herein required to be constructed near Dartmouth street, shall abandon the use of their present station in Park square for railroad purposes, and their railroad northerly of the crossing of the railroad of the Boston and Albany Railroad Company near and easterly of Dartmouth street, and the board of street commissioners of the city of Boston shall lay out, and said city shall construct, suitable approaches to said station or stations to be constructed near Dartmouth street, in such directions and as such grades as said board shall deem the public convenience and necessity require, and as the mayor of said city shall approve.

SECTION 21. The Boston and Albany Railroad Company shall contract with the Boston and Providence Railroad

Corporation and with its lessees for the construction or common use of said station and facilities, or for the construction and use of a joint station at or near said point, in accordance with plans and specifications to be prepared and approved in the manner herein-above provided for the preparation and approval of plans for the construction of a station by the Boston and Providence Railroad Corporation, or if it does not so contract, then upon the completion of the union passenger station it shall construct and open for public use a station or stations adequate for the accommodation of the public, at some point or points near Dartmouth street, and for that purpose it may purchase or otherwise take in fee any land within the following limits, to wit: Bounded southerly by the location of the Boston and Albany Railroad Company, westerly by Dartmouth street, northwesterly by land of the heirs of Eben D. Jordan, Trinity place, and land of the Massachusetts Institute of Technology, and easterly by the westerly line of Clarendon street extended. And whenever a station upon the tract of land herein above-described is opened for use, the Boston and Albany Railroad Company may discontinue its present passenger stations at Columbus avenue and Huntington avenue. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

SECTION 22. The Boston and Albany Railroad Company, within six months after the completion of said union station, shall abandon its present location from the southerly line of Kneeland street northerly to Beach street, and shall remove its tracks from the present grade crossing on Kneeland street between Lincoln street and Albany street, and, for the purpose of extending its terminal facilities may, from time

to time, purchase or otherwise take in fee, the whole or any part of the tract of land bounded and described as follows: Northerly by Kneeland street between the westerly side of Utica street and the easterly side of South street; easterly by the easterly line of South street to Lehigh street; thence across and by the westerly line of South street to the southerly line of Harvard street, so-called; southerly by the south line of Harvard street, so-called, to the westerly line of Utica street; and westerly by said line of Utica street to Kneeland street; and may discontinue and occupy for its purposes all streets and rights of way embraced within said limits, and may also take and discontinue any public or private ways within the tract of land bounded by Kneeland street, Albany street, Broadway, Lehigh street and South street.

SECTION 23. The laws of the Commonwealth relating to the taking of lands for railroad purposes, and the location and construction of railroads, and the assessment of damages occasioned thereby, shall be applicable to and govern the proceedings in the taking of land hereby authorized to be taken by said terminal company or by any railroad company, except that the locations shall be filed in the registry of deeds, as herein provided, and in case the parties, including mortgagees, cannot agree upon said damages, upon petition of any such party filed within one year after the taking of the land, in the clerk's office of the superior court for Suffolk county, the same shall be assessed by a jury in that court. But if any owner of land taken and all mortgagees thereof shall elect to have the damages assessed by a commission of three disinterested persons appointed by the court, the court shall appoint such commission to assess said damages, and their award, or the award of the major part of them, when made and accepted by the court, shall be final,

unless either party shall within sixty days thereafter appeal therefrom, in which case the damages shall be assessed by a jury in that court.

SECTION 24. No owner of any land taken under the provisions of this act shall be required to vacate his premises until three months after a location has been filed, taking the land, and the Boston Gas Light Company shall not be required to vacate the whole or any part of the premises now owned or occupied by it until six months after such filing, or until after such further time, not exceeding fifteen months from the time of such filing and notice, as the board of railroad commissioners and the board of gas and electric light commissioners, who are for this purpose constituted a joint board, may, upon the application of either the railroad company or the gas company, made at any time after the passage of this act, after hearing, prescribe in writing.

SECTION 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act.

SECTION 26. This act shall take effect upon its passage.

Approved June 9, 1896.

Massachusetts Acts, 1921, c. 363:

SECTION 1. Section two of chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six is

hereby amended by inserting after the word "Company," in the third line, the words: — its lessee, the New York Central Railroad Company,— and also by inserting after the word "for", in the eighth line, the words: — or purchase,— so as to read as follows:— *Section 2.* The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, its lessee, the New York Central Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for or purchase and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

SECTION 2. During the existence of the lease of the Boston and Albany Railroad to the New York Central Railroad Company authorized by chapter four hundred and sixty-eight of the acts of nineteen hundred, the New York Central Railroad Company shall exercise all the powers conferred upon the Boston and Albany Railroad Company under the provisions of said chapter five hundred and sixteen of the acts of eighteen hundred and ninety-six, as amended.

Approved May 7, 1921.